The Burger Court Opinion Writing Database

United States v. Crews

445 U.S. 463 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 10, 1980

Re: 78-777 - United States v. Crews

Dear Bill:

I am with Lewis' memo (1/10/80) and John's memo (1/9/80) on this case. (We can discuss its status at Conference on Friday.)

Regards,

WEB

Mr. Justice Brennan
Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1980

Re: 78-777 - United States v. Crews

Dear Byron:

Please show me as joining in your concurrence.

Regards,

WEB

Mr. Justice White

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 21, 1980

RE: No. 78-777 - United States v. Crews

Dear Bill:

Despite numerous and valiant efforts by yourself and others, it now appears clear that part IID of your draft opinion (as circulated February 20) will not command a majority. Because that is the dispositive part of the opinion, I think we should discuss at Conference tomorrow your earlier suggestion that someone else try his hand at an opinion.

We will discuss this Friday.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 26, 1980

RE: No. 78-777 - United States v. Crews

Dear Lewis:

I am in general agreement with your memorandum of February 23 and will likely be able to join your "sentence or two."

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1980

Re: 78-777 - United States v. Crews

Dear Lewis:

Please show me as joining you. I have already joined Byron.

Regards,

WEB

Mr. Justice Powell

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 20, 1980

PERSONAL

Re: 78-777 - United States v. Crews

Dear Lewis:

I find it somewhat incompatible to be joining you and Byron's latest version; moreover, I think it important to present a firm picture that the core of the holding is not in the "lead" opinion.

Hence, I withdraw my join with you and join only Byron.

Regards,

WEB

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 15, 1979

RE: Nos. 78-857 and 78-997
Yeshiva University Cases

Dear Lewis:

I do not think that you are disqualified to author the Court's opinion because you are the recipient of an Honorary Degree from Yeshiva.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 12/13/79

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–777

United States, Petitioner, v. Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[January —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are called upon to decide whether in the circumstances of this case an in-court identification of the accused by the victim of a crime should be suppressed as the fruit of the defendant's unlawful arrest.

I

On the morning of January 3, 1974, a woman was accosted and robbed at gunpoint by a young man in the women's restroom on the grounds of the Washington Monument. Her assailant, peering at her through a four-inch crack between the wall and the door of the stall she occupied, asked for $10 and demanded that he be let into the stall. When the woman refused, the robber pointed a pistol over the top of the door and repeated his ultimatum. The victim then surrendered the money, but the youth demanded an additional $10. When the woman opened her purse and showed her assailant that she had no more cash, he gained entry to her stall and made sexual advances upon her. She tried to resist and pleaded with him to leave. He eventually did, warning his victim that he would shoot her if she did not wait at least 20 minutes before following him out of the restroom. The woman complied, and upon leaving the restroom 20 minutes later, immediately reported the incident to the police.

On January 6, two other women were assaulted and robbed in a similar episode in the same restroom. A young man

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 14, 1979

RE: No. 78-777 United States v. Crews

Dear Lewis:

Thank you for your suggestions in this case. I have attempted to accommodate your concerns by making the following changes in the revised draft of the opinion, which I am circulating today:

1. On page 8, I have added citations to Ceccolini and Brown in footnote 16.

2. I have made two changes in Part III(B) of the opinion - moving what was formerly the last sentence to that section to the top of page 9 and substituting the phrase "affect the reliability of" for the word "contaminate" in the very next sentence.

3. In footnote 26, I have deleted the reference to United States v. Humphries.

The above changes, of course, are in addition to those already made upon Potter's suggestions.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 14, 1979

RE: No. 78-777 United States v. Crews

Dear Potter:

Thank you very much for your comments of December 13 on the circulated opinion in the above. I'll be happy to make all the changes that you suggest. I'll have a circulation incorporating them as soon as I can get it from the printer.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 14, 1979

RE: No. 78-777 United States v. Crews

Dear Bill:

Potter's suggestions of December 13 reached me just after yours. I enclose a copy of my response to Potter. Will the deletion of the last three lines of the paragraph on page 7 meet your concerns?

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

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Changes:
7-9, 13

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

2nd DRAFT Recirculated: 4 DEC 1979

SUPREME COURT OF THE UNITED STATES

No. 78–777

United States, Petitioner, v. Keith Crews. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[January —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are called upon to decide whether in the circumstances of this case an in-court identification of the accused by the victim of a crime should be suppressed as the fruit of the defendant's unlawful arrest.

I

On the morning of January 3, 1974, a woman was accosted and robbed at gunpoint by a young man in the women's restroom on the grounds of the Washington Monument. Her assailant, peering at her through a four-inch crack between the wall and the door of the stall she occupied, asked for $10 and demanded that he be let into the stall. When the woman refused, the robber pointed a pistol over the top of the door and repeated his ultimatum. The victim then surrendered the money, but the youth demanded an additional $10. When the woman opened her purse and showed her assailant that she had no more cash, he gained entry to her stall and made sexual advances upon her. She tried to resist and pleaded with him to leave. He eventually did, warning his victim that he would shoot her if she did not wait at least 20 minutes before following him out of the restroom. The woman complied, and upon leaving the restroom 20 minutes later, immediately reported the incident to the police.

On January 6, two other women were assaulted and robbed in a similar episode in the same restroom. A young man

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 17, 1979

RE: No. 78-777 United States v. Crews

Dear Bill:

Thank you for your letter of December 14. I do not think that the opinion in this case implies that Frisbie v. Collins, 342 U.S. 519 (1952), is inapplicable where probable cause to arrest the defendant is lacking. Indeed, the opinion cites Frisbie for precisely the proposition that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" Id., at 522.

I do not, however, believe that Frisbie means that the use of the defendant's body as evidence can never be "tainted" in the Fourth Amendment sense. Were this a case like Davis v. Mississippi, for example, and the police had randomly arrested a number of individuals - without any reasonable basis for suspecting them of the robberies - merely to see if the victim could identify one of them, I might well lean towards concluding that the in-court identification ought to be suppressed. I suspect you would lean the other way. But the Davis problem is simply not presented in this case, and I have endeavored to write the opinion so as to leave the treatment of that situation open.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 8, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 78-777 - United States v. Crews

The various memoranda that have circulated recently suggest some misunderstanding of the rationale of the draft opinion in this case. I hope this memorandum will clarify my views.

While I had originally intended to circulate a relatively straightforward opinion relying on Frisbie v. Collins, 342 U.S. 519 (1952), further examination persuaded me that that analysis would not adequately resolve the case. Two characters play crucial roles in the courtroom identification: the victim and the defendant. There is no dispute as to whether the victim is "tainted." Her initial observation of the assailant obviously preceded the defendant's unlawful arrest and therefore was not the product of any police misconduct. Nor was her identity discovered through any unlawful activity. Thus the only possible question is whether her courtroom testimony identifying the defendant was based solely on her untainted observations of the robber at the time of the crime or whether her subsequent viewing of the defendant and/or his photograph - conceded to be "tainted" by his illegal arrest - somehow infected the in-court identification. The answer is quite clearly "no," for there is no allegation that either the photo

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 5, 1980

RE: No. 78-777 United States v. Crews

Dear Chief:

My scorecard as of this date suggests that the circulations and memos of Byron, John, Lewis and Bill reflect the view that Crews' face is not evidence, and that the issue of admissibility focuses only on whether the testimony of the identifying witness is tainted. In contrast, I say that the face is evidence subject to suppressibility in a proper case, but not in this one.

Thurgood is out of the case, I haven't heard from Harry, and Potter indicated in a note to me of December 13 that he might join me if I made certain changes, which I have made.

It thus appears that someone else might be more successful than I have been in writing an opinion that will command a Court. If it is reassigned I'll file my circulation as a concurring opinion.

Sincerely,

Bill

The Chief Justice

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 8, 1980

RE: No. 78-777 United States v. Crews

Dear Lewis:

I am quite willing to make the deletion requested in your memo of February 7, and I have today sent to the printer a revised draft of the opinion that incorporates as well the word changes discussed by our clerks. Although I regret that you are unable to join the opinion in its entirety, I appreciate your help in trying to forge some sort of consensus. I am hopeful that your optimism that I might yet announce the judgment in this case will bear fruit.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

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8, 9, 14

The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Mr. Mr. Justice Brennan

Circulated: _____

Recirculated: FEB 12 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–777

United States, Petitioner, *v.* Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[January —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are called upon to decide whether in the circumstances of this case an in-court identification of the accused by the victim of a crime should be suppressed as the fruit of the defendant's unlawful arrest.

I

On the morning of January 3, 1974, a woman was accosted and robbed at gunpoint by a young man in the women's restroom on the grounds of the Washington Monument. Her assailant, peering at her through a four-inch crack between the wall and the door of the stall she occupied, asked for $10 and demanded that he be let into the stall. When the woman refused, the robber pointed a pistol over the top of the door and repeated his ultimatum. The victim then surrendered the money, but the youth demanded an additional $10. When the woman opened her purse and showed her assailant that she had no more cash, he gained entry to her stall and made sexual advances upon her. She tried to resist and pleaded with him to leave. He eventually did, warning his victim that he would shoot her if she did not wait at least 20 minutes before following him out of the restroom. The woman complied, and upon leaving the restroom 20 minutes later, immediately reported the incident to the police.

On January 6, two other women were assaulted and robbed in a similar episode in the same restroom. A young man

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8

Circulated: _____

Recirculated: FEB 14 198

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–777

United States, Petitioner, v. Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[January —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are called upon to decide whether in the circumstances of this case an in-court identification of the accused by the victim of a crime should be suppressed as the fruit of the defendant's unlawful arrest.

I

On the morning of January 3, 1974, a woman was accosted and robbed at gunpoint by a young man in the women's restroom on the grounds of the Washington Monument. Her assailant, peering at her through a four-inch crack between the wall and the door of the stall she occupied, asked for $10 and demanded that he be let into the stall. When the woman refused, the robber pointed a pistol over the top of the door and repeated his ultimatum. The victim then surrendered the money, but the youth demanded an additional $10. When the woman opened her purse and showed her assailant that she had no more cash, he gained entry to her stall and made sexual advances upon her. She tried to resist and pleaded with him to leave. He eventually did, warning his victim that he would shoot her if she did not wait at least 20 minutes before following him out of the restroom. The woman complied, and upon leaving the restroom 20 minutes later, immediately reported the incident to the police.

On January 6, two other women were assaulted and robbed in a similar episode in the same restroom. A young man

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 14, 1980

RE: No. 78-777 United States v. Crews

Dear Lewis:

Thank you very much for your joinder except as to pages 11-14. To make the recital more understandable, I'll caption pages 11-14 as section D. I can then recite in the opening of the opinion "Brennan, J. joined by Powell, J., except as to Part II D." Hopefully this may assist other colleagues who may share your view.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

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To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: FEB 20 1980

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–777

United States, Petitioner, v. Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[January —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are called upon to decide whether in the circumstances of this case an in-court identification of the accused by the victim of a crime should be suppressed as the fruit of the defendant's unlawful arrest.

I

On the morning of January 3, 1974, a woman was accosted and robbed at gunpoint by a young man in the women's restroom on the grounds of the Washington Monument. Her assailant, peering at her through a four-inch crack between the wall and the door of the stall she occupied, asked for $10 and demanded that he be let into the stall. When the woman refused, the robber pointed a pistol over the top of the door and repeated his ultimatum. The victim then surrendered the money, but the youth demanded an additional $10. When the woman opened her purse and showed her assailant that she had no more cash, he gained entry to her stall and made sexual advances upon her. She tried to resist and pleaded with him to leave. He eventually did, warning his victim that he would shoot her if she did not wait at least 20 minutes before following him out of the restroom. The woman complied, and upon leaving the restroom 20 minutes later, immediately reported the incident to the police.

On January 6, two other women were assaulted and robbed in a similar episode in the same restroom. A young man

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11-12 & footnotes deleted

The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: FEB 22 19

Recirculated: _____

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–777

United States, Petitioner, v. Keith Crews. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[January —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are called upon to decide whether in the circumstances of this case an in-court identification of the accused by the victim of a crime should be suppressed as the fruit of the defendant's unlawful arrest.

I

On the morning of January 3, 1974, a woman was accosted and robbed at gunpoint by a young man in the women's restroom on the grounds of the Washington Monument. Her assailant, peering at her through a four-inch crack between the wall and the door of the stall she occupied, asked for $10 and demanded that he be let into the stall. When the woman refused, the robber pointed a pistol over the top of the door and repeated his ultimatum. The victim then surrendered the money, but the youth demanded an additional $10. When the woman opened her purse and showed her assailant that she had no more cash, he gained entry to her stall and made sexual advances upon her. She tried to resist and pleaded with him to leave. He eventually did, warning his victim that he would shoot her if she did not wait at least 20 minutes before following him out of the restroom. The woman complied, and upon leaving the restroom 20 minutes later, immediately reported the incident to the police.

On January 6, two other women were assaulted and robbed in a similar episode in the same restroom. A young man

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 26, 1980

Re: No. 78-777 - United States v. Crews

Dear Potter:

Thank you for your memo of February 26. I am willing to make the additional changes you suggest, and I will have another draft sent to the printer. With your vote, we now have three for the opinion, and with Byron and Bill still to be heard from, the case may yet be mine to announce.

Sincerely,

Bill

WJB, Jr.

Mr. Justice Stewart

Copies to the Conference

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91, 13 & n. 23 deleted

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: FEB 29 1980

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–777

United States, Petitioner, v. Keith Crews. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[January —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are called upon to decide whether in the circumstances of this case an in-court identification of the accused by the victim of a crime should be suppressed as the fruit of the defendant's unlawful arrest.

I

On the morning of January 3, 1974, a woman was accosted and robbed at gunpoint by a young man in the women's restroom on the grounds of the Washington Monument. Her assailant, peering at her through a four-inch crack between the wall and the door of the stall she occupied, asked for $10 and demanded that he be let into the stall. When the woman refused, the robber pointed a pistol over the top of the door and repeated his ultimatum. The victim then surrendered the money, but the youth demanded an additional $10. When the woman opened her purse and showed her assailant that she had no more cash, he gained entry to her stall and made sexual advances upon her. She tried to resist and pleaded with him to leave. He eventually did, warning his victim that he would shoot her if she did not wait at least 20 minutes before following him out of the restroom. The woman complied, and upon leaving the restroom 20 minutes later, immediately reported the incident to the police.

On January 6, two other women were assaulted and robbed in a similar episode in the same restroom. A young man

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To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: MAR 5 1980

8th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–777

United States, Petitioner, *v.* Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[January —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court, except as to Part II–D.

We are called upon to decide whether in the circumstances of this case an in-court identification of the accused by the victim of a crime should be suppressed as the fruit of the defendant's unlawful arrest.

I

On the morning of January 3, 1974, a woman was accosted and robbed at gunpoint by a young man in the women's restroom on the grounds of the Washington Monument. Her assailant, peering at her through a four-inch crack between the wall and the door of the stall she occupied, asked for $10 and demanded that he be let into the stall. When the woman refused, the robber pointed a pistol over the top of the door and repeated his ultimatum. The victim then surrendered the money, but the youth demanded an additional $10. When the woman opened her purse and showed her assailant that she had no more cash, he gained entry to her stall and made sexual advances upon her. She tried to resist and pleaded with him to leave. He eventually did, warning his victim that he would shoot her if she did not wait at least 20 minutes before following him out of the restroom. The woman complied, and upon leaving the restroom 20 minutes later, immediately reported the incident to the police.

On January 6, two other women were assaulted and robbed in a similar episode in the same restroom. A young man

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HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

MEMORANDUM TO THE CONFERENCE

RE: CASES HELD FOR UNITED STATES v. CREWS, No. 78-777

United States v. Humphries, No. 78-1803 (CA9 1979).

Respondent is under indictment with four other individuals for his alleged involvement in a drug smuggling operation. On respondent's motion, the District Court ordered the suppression of his identity and "any and all other physical evidence and statements obtained as a result" of his illegal arrest. A subsequent motion by the government for a "Determination of Admissibility of Evidence" resulted in a similar judgment by a second district judge. The government appealed from that decision and the Court of Appeals affirmed in part and reversed in part.

Although somewhat complicated, the facts can be reduced to relevant essentials: After taking respondent to a location where he could await a ride, the driver, Frank Sisto, became suspicious and called the police. Based on this report, an agent of the Bureau of Indian Affairs went to the location and illegally arrested respondent. During his detention, the agent obtained respondent's name, address, fingerprints, and photograph - information that was eventually passed on to law enforcement officers in Arizona, who used it to acquire a driver's license photo of respondent. That picture was then used to identify respondent at a Scottsdale residence, and the ensuing stakeout of that residence led to the acquisition of incriminating evidence. The evidence ordered suppressed falls into three categories:

1) The District Court ruled that Sisto's testimony identifying respondent as the man to whom he gave a ride must be excluded. The Court of Appeals reversed, reasoning that Sisto's testimony was based solely on events that preceded respondent's unlawful arrest. This is completely consistent with our decision in Crews.

2) A second class of evidence involves the testimony of a witness named Thompson, who was himself implicated in the smuggling operations and whose identity was discovered through an investigation that was conceded to be wholly untainted by respondent's unlawful arrest. Once located, however, Thompson was specifically questioned about respondent only because of information obtained during the illegal arrest. Following the

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 13, 1979

Re: No. 78-777, United States v. Crews

Dear Bill,

I have read your opinion with interest and basically agree with it. Although what you have written seems somewhat at odds with my understanding of our Conference agreement -- to produce a relatively simple and straightforward opinion relying on the doctrine of Frisbie v. Collins, 342 U.S. 519, I am glad to defer to your judgment as the author.

I do have a couple of specific difficulties. The first parallels that expressed by Bill Rehnquist. It could be met by putting the word "or" between the words "activity" and "confessions" on the first line of page 7, putting a period after the word "detention" on the second line, and deleting the last three lines of that paragraph. My second difficulty could be met by changing the final sentence now appearing at the bottom of page 7 and the top of page 8 as follows: In the present case, it is our conclusion that none of these three elements etc. The sentence would then end after the citation to Wong Sun, and the language at the top of page 8 would be eliminated. My final specific difficulty would be met by deleting the phrase "to its logical conclusion" in the first and second lines of note 26 on page 13.

If you should be disposed to give favorable consideration to the above suggestions, which I think are really very minor, I would be glad to join your opinion for the Court.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 21, 1980

Re: 78-777 - United States v. Crews

Dear Bill:

With thanks to you and Lewis for pointing the way, I am glad to join all but II D of your opinion for the Court.

If II D were carefully recasted along the lines that John suggests, I could probablly join it as well.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

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Supreme Court of the United States
Washington 25, D. C.

CHAMBERS OF
JUSTICE POTTER STEWART

February 26, 1980

Re: No. 78-777, United States v. Crews

Dear Bill,

I have read with interest the revised Part II D of your opinion, and, if you are disposed to make the following additional changes, I shall be glad to join it:

1. Eliminate all of that portion of footnote 22 that follows the phrase "Fourteenth Amendment rights" in line 5 thereof.

2. Eliminate footnote 23.

3. Add a qualifying clause after the word "admissible" in the 6th line from the bottom of the text on page 13 along the following lines: ", even if the respondent's argument be accepted,".

I am sure that you are thoroughly tired of this opinion, and tired as well of what may seem to be a stubbornly unreasonable attitude on the part of some of your colleagues. Accordingly, I shall fully understand it if you are unwilling to make the above changes, and in that case I shall simply adhere to my previous agreement with all of your opinion except Part II D.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington 25, D. C.

CHAMBERS OF
JUSTICE POTTER STEWART

February 29, 1980

Re: No. 78-777, United States v. Crews

Dear Bill,

I am glad to join your entire opinion, as recirculated today.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 15, 1979

Re: Nos. 78-857 and 78-997 -
Yeshiva University cases

Dear Lewis,

Although the bottom line has to be yours, I would not think that the honorary degree from Yeshiva would stand in the way of either your participation or your authoring the opinion.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

cmc

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 2 JAN 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–777

United States, Petitioner, *v.* Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[January —, 1980]

MR. JUSTICE WHITE, concurring in the result.

Respondent Crews was convicted after an in-court identification by the victim whose own recollection and identification the Court concedes was untainted by prior illegal conduct by the police. Although the presence of Crews in the courtroom would not have occurred but for his arrest without probable cause, the in-court identification is held admissible. As I understand the Court's opinion, however, it would have been inadmissible had there not been some reason to suspect Crews at the time of his illegal arrest. Such a rule excluding an otherwise untainted, in-court identification is tantamount to holding that an arrest without reasonable suspicion effectively insulates one from conviction for any crime where an in-court identification is essential. Nor do I perceive a constitutional basis for dispensing with probable cause but requiring reasonable suspicion.

Assume that a person is arrested for crime X and that answers to questions put to him without *Miranda* warnings implicate him in crime Y for which he is later tried. The victim of crime Y identifies him in the courtroom; the identification has an independent, untainted basis. I would not suppress such an identification on the grounds that the police had no reason to suspect the defendant of crime Y prior to their illegal questioning and that it is only because of that questioning that he is present in the courtroom for trial. I would reach the same result whether or not his arrest for

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 3 JAN 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-777

United States, Petitioner, *v.* Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[January —, 1980]

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, concurring in the result.

Respondent Crews was convicted after an in-court identification by the victim whose own recollection and identification the Court concedes was untainted by prior illegal conduct by the police. Although the presence of Crews in the courtroom would not have occurred but for his arrest without probable cause, the in-court identification is held admissible. As I understand the Court's opinion, however, it would have been inadmissible had there not been some reason to suspect Crews at the time of his illegal arrest. Such a rule excluding an otherwise untainted, in-court identification is tantamount to holding that an arrest without reasonable suspicion effectively insulates one from conviction for any crime where an in-court identification is essential. Nor do I perceive a constitutional basis for dispensing with probable cause but requiring reasonable suspicion.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–777

United States, Petitioner, *v.* Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[January —, 1980]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the result.

Respondent Crews was convicted after an in-court identification by the victim whose own recollection and identification the Court concedes was untainted by prior illegal conduct by the police. Although the presence of Crews in the courtroom would not have occurred but for his arrest without probable cause, the in-court identification is held admissible. As I understand the Court's opinion, however, it would have been inadmissible had there not been some reason to suspect Crews at the time of his illegal arrest. Such a rule excluding an otherwise untainted, in-court identification is tantamount to holding that an arrest without reasonable suspicion effectively insulates one from conviction for any crime where an in-court identification is essential. Nor do I perceive a constitutional basis for dispensing with probable cause but requiring reasonable suspicion.

Assume that a person is arrested for crime X and that answers to questions put to him without *Miranda* warnings implicate him in crime Y for which he is later tried. The victim of crime Y identifies him in the courtroom; the identification has an independent, untainted basis. I would not suppress such an identification on the grounds that the police had no reason to suspect the defendant of crime Y prior to their illegal questioning and that it is only because of that questioning that he is present in the courtroom for trial. I would reach the same result whether or not his arrest for

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 26, 1980

MEMO TO THE CONFERENCE

Re: No. 78-777 - United States v. Crews

In light of Bill Brennan's latest circulation and of his proposed changes, I have rewritten my concurrence somewhat. The prior edition was joined by the Chief and Bill Rehnquist.

B. R. W.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 26 FEB 1980

No. 78-777 - United States v. Crews

MR. JUSTICE WHITE, concurring in the result.

The Court today holds that an in-court identification of the accused by the victim of a crime should not be suppressed as the fruit of the defendant's unlawful arrest. Although we are unanimous in reaching this result, the Court leaves the law in an unnecessarily confused posture by reserving the question whether a defendant's face can ever be considered evidence suppressible as the "fruit" of an illegal arrest. Because I consider this question to be controlled by the rationale of Frisbie v. Collins, 342 U.S. 519 (1952), I write separately.

Respondent Crews was convicted after an in-court identification by the victim whose own presence at trial, recollection and identification the Court holds were untainted by prior illegal conduct by the police. Under these circumstances the manner in which the defendant's presence at trial was obtained is irrelevant to the admissibility of the in-court identification. We held in Frisbie v. Collins, supra, at 522

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Pp. 1, 2, 3

From: Mr. Justice White

Circulated: _____

4th PRINTED DRAFT

Recirculated: 27 FEB 1980

SUPREME COURT OF THE UNITED STATES

No. 78-777

United States, Petitioner, *v.* Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[March —, 1980]

with whom MR. JUSTICE REHNQUIST joins,

MR. JUSTICE WHITE concurring in the result.

The Court today holds that an in-court identification of the accused by the victim of a crime should not be suppressed as the fruit of the defendant's unlawful arrest. Although we are unanimous in reaching this result, the Court leaves the law in an unnecessarily confused posture by reserving the question whether a defendant's face can ever be considered evidence suppressible as the "fruit" of an illegal arrest. Because I consider this question to be controlled by the rationale of *Frisbie* v. *Collins*, 342 U. S. 519 (1952), I write separately.

Respondent Crews was convicted after an in-court identification by the victim whose own presence at trial, recollection and identification the Court holds were untainted by prior illegal conduct by the police. Under these circumstances the manner in which the defendant's presence at trial was obtained is irrelevant to the admissibility of the in-court identification. We held in *Frisbie* v. *Collins, supra*, at 522, "that the power of a court to try a person for crime is not impaired by the fact that he has been brought within the court's jurisdiction" unlawfully. A holding that a defendant's face can be considered evidence suppressible as the fruit of an illegal arrest would be tantamount to holding that an illegal arrest effectively insulates one from conviction for any crime where an in-court identification is essential. Such a holding would be inconsistent with the underlying rationale of *Frisbie* from which we have not retreated. *Stone* v. *Powell*, 428 U. S. 465, 485 (1976); *Gerstein* v. *Pugh*, 420 U. S. 103, 119 (1975).

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 20 MAR 1980

1-3

5th PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–777

United States, Petitioner, v. Keith Crews. | On Writ of Certiorari to the District of Columbia Court of Appeals.

[March —, 1980]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the result.

The Court today holds that an in-court identification of the accused by the victim of a crime should not be suppressed as the fruit of the defendant's unlawful arrest. Although we are unanimous in reaching this result, MR. JUSTICE BRENNAN's opinion reserves the question whether a defendant's face can ever be considered evidence suppressible as the "fruit" of an illegal arrest. Because I consider this question to be controlled by the rationale of *Frisbie* v. *Collins*, 342 U. S. 519 (1952), I write separately.

Respondent Crews was convicted after an in-court identification by the victim whose own presence at trial, recollection and identification the Court holds were untainted by prior illegal conduct by the police. Under these circumstances the manner in which the defendant's presence at trial was obtained is irrelevant to the admissibility of the in-court identification. We held in *Frisbie* v. *Collins*, *supra*, at 522, "that the power of a court to try a person for crime is not impaired by the fact that he has been brought within the court's jurisdiction" unlawfully. A holding that a defendant's face can be considered evidence suppressible for no reason other than that the defendant's presence in the courtroom is the fruit of an illegal arrest would be tantamount to holding that an illegal arrest effectively insulates one from conviction for any crime where an in-court identification is essential. Such

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 13, 1979

Re: No. 78-777 - United States v. Crews

Dear Bill:

Please note that I took no part in this case.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 16, 1979

Re: No. 78-857 - NLRB v. Yeshiva University
No. 78-997 - Yeshiva University Faculty Assn v. Yeshiva University

Dear Lewis:

The decision ultimately must be yours, but I see no reason why your honorary degree should disqualify you. I, of course, am on the down side in this case.

Sincerely,

Harry

Mr. Justice Powell
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 19, 1980

Re: No. 78-777 - United States v. Crews

Dear Bill:

This case has given me difficulty as to proper analysis, not as to result. I have been experimenting with a separate concurrence based on attenuation, which I am almost persuaded is the soundest approach. For now, however, and to bring the matter to a head, I have concluded that, on the facts of this case, it is not worth the effort.

I find myself, then, generally where Lewis is as described in his letter of February 14 to you. I join your opinion as recirculated on February 14 (4th draft) except pages 11-14 thereof. To put it another way, if those pages are now made into Part IID, as you have indicated would be done, I join all of your opinion except Part IID thereof.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 26, 1980

Re: No. 78-777 - United States v. Crews

Dear Bill:

I share Lewis' concern, as set forth in his note of February 23, and may well join what he writes. Would it be possible for you to eliminate Part IID, or a good bit thereof, and hold what appears to be a solid Court? Otherwise, as would Potter, I would simply adhere to my previous agreement with all of your opinion except Part IID.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 28, 1980

Re: No. 78-777 - United States v. Crews

Dear Lewis:

Please join me in your opinion concurring in part.

Sincerely,

HAB

Mr. Justice Powell

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

December 14, 1979

78-777 U.S. v. Crews

Dear Bill:

This case reminds me a little bit of Murgia, in which you and I tried unsuccessfully to harmonize the views of the Court on the language of equal protection analysis. Perhaps to a lesser extent, views as to the application of certain Fourth Amendment principles have differed. You and I, for example, often have been together and occasionally some distance apart. Decisions since Wong Sun certainly reflect some differences of opinion.

Thus, although your task in this case has not been easy. I think you have written a fine opinion. Yet, as indicated by Potter and Bill Rehnquist, there is some language that is troublesome. I believe, however, that it is not at all essential to your analysis, and therefore I make the following suggestions for your consideration.

First, it seems unnecessary to take a position to the application of the exclusionary rule to the testimony of life witnesses. Op., at 7 and n. 15, 8 and n. 16. Since the victim-witness in this case identified herself to the police, we need not suggest the analysis that might apply had their knowledge of her identity been "tainted." I have thought that our opinions in United States v. Ceccolini, 435 U.S. 268, 276-79 (1978), and Brown v. Illinois, 422 U.S. 590, 603-04 (1975), establish that special considerations limit the application of the rule to live testimony. I therefore hope that you can consider deleting the fifth sentence in subpart A on page 8.

I agree with your conclusion that the photographic and lineup identifications did not affect the victim's ability to give accurate testimony at trial, Op., at 8-10. We have viewed this as a due process clause question. In other words, whether or not these pre-trial identifications

[redacted]uits of the illegal arrest, the dispositive question [redacted]be whether they were "so impermissibly suggestive as to [redacted]rise to a very substantial likelihood of irreparable [redacted]dentification." Simmons v. United States, 390 U.S. 377, [redacted](1968). If the pre-trial identifications were not [redacted]ggestive, then the victim could testify at trial on the [redacted]sis of her prior recollection. If they were so suggestive, [redacted]hen we would exclude the victim's in-court identification [redacted]ot because it had been tainted by the illegal arrest, but [redacted]ecause it might be unreliable. Neil v. Biggers, 409 U.S. [redacted]88 (1972). Your opinion relies on this analysis, but adds certain language in Part II(B) and footnote 19 that can be read as also requiring an absence of "taint". I would think this might be confusing and certainly it need not be said in this case.

Although the analysis in Part III(C) of your opinion departs somewhat from my understanding of the Conference discussion, I can agree with your disposition of respondent's claim that his presence itself is "evidence." I share, however, Potter's difficulty with footnote 26--particularly since it mentions a pending case that raises an issue not directly addressed in your opinion. United States v. Humphries, 600 F.2d 1238 (9th Cir. 1979), cert. pending, No. 78-1803. Potter's proposal for a modification in the introductory sentence would help some, but I would be grateful if you could delete the entire footnote.

If you can accommodate me on these suggestions, I will be glad to join your opinion.

Sincerely,

Lewis

Mr. Justice Brennan

cc: The Conference

lfp/ss

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 10, 1980

78-777 U.S. v. Crews

Dear Bill:

This is in response to your memorandum of January 8.

Although the second draft of your opinion accommodated some of my original concerns, I have refrained from joining you precisely because of a developing concern about the issue discussed in your memorandum.

In sum, I agree with John Stevens' note of January 9. I do not think I could agree that the defendant himself is evidence. It is true, as you say, that Frisbie, Kerr and progeny do not address precisely the question you pose. Yet, in Hugo's opinion in Frisbie he said that so long as a trial is otherwise "fair . . . in accordance with constitutional procedural safeguards", 342 U.S. 519, 522, it is immaterial that the accused's presence was procured unlawfully.

If I understand your memorandum, we could have a situation where the accused had been unlawfully arrested but there were ten eyewitnesses to the crime who identified him as the perpetrator, and whose testimony was untainted in any way. The Frisbie doctrine at least establishes that the Court has the power to try such a defendant. Yet, if the only evidence were the unanimous testimony of the ten eyewitnesses, there could - in effect - be no trial.

Sincerely,

Lewis

Mr. Justice Brennan

cc: The Conference

lfp/ss

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 7, 1980

No. 78-777 United States v. Crews

Dear Bill:

In light of recent exchanges, I again have reviewed the "bidding."

In a sentence, I am about where John Stevens is as stated in his two sentence opinion of January 4. As I indicated in my letter of January 10, I am not with you on the Frisbie issue. I therefore am unable to join Part II-C.

John also would not join the first two paragraphs of Part II. Although--as you know--we have some differences as to the reach of Wong Sun, I think that I could go along with these two paragraphs as they appear in your second draft. As I noted in my letter of December 14, however, I have difficulty with the penultimate sentence in Part II-A and the cases cited in the footnote to it. That sentence seems to imply substantially the same thing as the passage that you already have deleted from the first paragraph in Part II. If you also could delete this remaining reference to the live witness problem, I could join Part II-A of your opinion. I also could join Part II-B with several slight word changes that my clerk can suggest to yours.

If this can be worked out, perhaps you would have a Court for all of your opinion except Part II-C and possibly some language in Part II. As this case was assigned to you and in view of the effort you have devoted to it, I would like to see you retain what would be the major portions of the opinion.

Sincerely,

Lewis

Mr. Justice Brennan

Copies to the Conference

WJB/lab

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 14, 1980

78-777 United States v. Crews

Dear Bill:

Except for the portion of Part II-C, identified in the next sentence, I am now persuaded to join your opinon for the Court.

Please join me, therefore, in all of your opinion including the first paragraph of Part II-C, but excluding the remainder of II-C. Putting it differently, I join all of the third draft of your opinion except - as it is presently printed - pages 11-14 inclusive.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 23, 1980

78-777 U.S. v. Crews

Dear Bill:

I regret not being able to accept the change made, at John's suggestion, in Part II-D in your circulation of February 22.

Although you reserve the Frisbie/Kerr issue, the reservation implies that it is an open question. For reasons previously stated, I do not view the question as open, and certainly would not like to invite litigation - perhaps in many courts - based on an apparent suggestion that this Court is open to argument on whether a defendant's "physiognomy" is simply treated as another item of evidence.

I suppose it would be appropriate for me to write a sentence or two concurring in your opinion except for this part, and stating my reason for not joining it.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

February 26, 1980

LFP

MEMORANDUM TO THE CONFERENCE

Re: Case held for Nos. 78-857 and 78-997, Yeshiva University cases

No. 78-67, Trustees of Boston University v. NLRB, has been held for Yeshiva.

In this case, the National Labor Relations Board ordered an election in a faculty bargaining unit that included department chairmen but excluded the members of the law, medical, and dental faculties. The University argued only that its department chairmen were supervisors, and that its professional faculties should be included in the unit. The Board rejected both contentions, reasoning (i) that department chairmen do not directly supervise other professors, make most decisions as recommendations to the dean after consultation with the faculty, and spend only a small amount of time supervising non-faculty personnel; and (ii) that the professional schools were autonomous, with faculties that enjoyed substantial outside employment and higher salaries.

The union won the election, and the Board ordered the university to bargain. In the unfair labor practice proceeding, petitioner argued for the first time that all of its faculty fell outside the coverage of the Act. The Board refused to hear this argument because it was not raised in the representation proceeding. Petitioner did not challenge that refusal before the CA1, (Coffin, Campbell, Bownes) which enforced the bargaining order. CA1 found that the Board's rulings were supported by substantial evidence.

Petitioner argues that Boston University's department chairmen have at least as much effective control over the employment conditions of other employees as did the faculty of Yeshiva University. Petitioner also challenges the Board's 50% rule, under which employees who spend less

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: FEB 28 1980

Recirculated: _____

No. 78-777: United States v. Crews

MR. JUSTICE POWELL, concurring in part.

I join the Court's opinion except for Part II-D. I would reject explicitly, rather than appear to leave open, the claim that a defendant's face can be a suppressible fruit of an illegal arrest. I agree with MR. JUSTICE WHITE's view, ante, at - -, that this claim is foreclosed by the rationale of Frisbie v. Collins, 342 U.S. 519 (1952), and Ker v. Illinois, 119 U.S. 436 (1886). These cases establish that a defendant properly may be brought into court for trial even though he was arrested illegally. Thus, the only evidence at issue is the robbery victims' identification testimony. I agree with the Court that the victims' testimony is not tainted.

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The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell
FEB 29 1980
Circulated: _____
Recirculated: _____

2-28-80

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-777

United States, Petitioner, *v.* Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[March —, 1980]

MR. JUSTICE POWELL, concurring in part.

I join the Court's opinion except for Part II-D. I would reject explicitly, rather than appear to leave open, the claim that a defendant's face can be a suppressible fruit of an illegal arrest. I agree with MR. JUSTICE WHITE's view, *ante*, at —, that this claim is foreclosed by the rationale of *Frisbie* v. *Collins*, 342 U. S. 519 (1952), and *Ker* v. *Illinois*, 119 U. S. 436 (1886). These cases establish that a defendant properly may be brought into court for trial even though he was arrested illegally. Thus, the only evidence at issue is the robbery victim's identification testimony. I agree with the Court that the victims' testimony is not tainted.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

3-17-80

Circulated: _____

2nd DRAFT

Recirculated: MAR 17 1980

SUPREME COURT OF THE UNITED STATES

No. 78-777

United States, Petitioner, v. Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[March —, 1980]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring in part.

I join the Court's opinion except for Part II-D. I would reject explicitly, rather than appear to leave open, the claim that a defendant's face can be a suppressible fruit of an illegal arrest. I agree with MR. JUSTICE WHITE's view, *ante*, at —, that this claim is foreclosed by the rationale of *Frisbie* v. *Collins*, 342 U. S. 519 (1952), and *Ker* v. *Illinois*, 119 U. S. 436 (1886). These cases establish that a defendant properly may be brought into court for trial even though he was arrested illegally. Thus, the only evidence at issue is the robbery victim's identification testimony. I agree with the Court that the victims' testimony is not tainted.

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The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: MAR 19 1980

3-18-80

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-777

United States, Petitioner, v. Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[March —, 1980]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in part.

I join the Court's opinion except for Part II-D. I would reject explicitly, rather than appear to leave open, the claim that a defendant's face can be a suppressible fruit of an illegal arrest. I agree with MR. JUSTICE WHITE's view, *ante*, at —, that this claim is foreclosed by the rationale of *Frisbie* v. *Collins*, 342 U. S. 519 (1952), and *Ker* v. *Illinois*, 119 U. S. 436 (1886). Those cases establish that a defendant properly may be brought into court for trial even though he was arrested illegally. Thus, the only evidence at issue in this case is the robbery victims' identification testimony. I agree with the Court that the victims' testimony is not tainted.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

3-21-80

From: Mr. Justice Powell

4th DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Recirculated: MAR 21

No. 78-777

United States, Petitioner, *v.* Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[March —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring in part.

I join the Court's opinion except for Part II-D. I would reject explicitly, rather than appear to leave open, the claim that a defendant's face can be a suppressible fruit of an illegal arrest. I agree with MR. JUSTICE WHITE's view, *ante*, at —, that this claim is foreclosed by the rationale of *Frisbie* v. *Collins*, 342 U. S. 519 (1952), and *Ker* v. *Illinois*, 119 U. S. 436 (1886). Those cases establish that a defendant properly may be brought into court for trial even though he was arrested illegally. Thus, the only evidence at issue in this case is the robbery victims' identification testimony. I agree with the Court that the victims' testimony is not tainted.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 13, 1979

Re: No. 78-777 - United States v. Crews

Dear Bill:

I have only casually glanced through your opinion in United States v. Crews circulated today, and obviously agree with the result. I do have a great deal of difficulty with the language on page 7 dealing with the fruit of the poisonous tree where, in lines 3 through 5, you say, "or even the testimony of witnesses whose existence became known to the police only as a result of the official misconduct." I have a feeling, without having thoroughly gone through your opinion or going back and reading my opinion two Terms ago in United States v. Ceccolini that there is some tension between the two. With the Christmas spirit rapidly coming upon us, I certainly don't expect any immediate reply from you, but would be interested to know whether you think I am totally mistaken.

Sincerely,

Bill

Mr. Justice Brennan

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 14, 1979

Re: No. 78-777 - United States v. Crews

Dear Bill:

I appreciate your prompt response to my letter to you of yesterday relating to the Ceccolini point in your opinion. I have not yet had a chance to fully digest the changes you have made in response to both Lewis and Potter, but I am sure that they would go at least part way in meeting their concerns.

Meanwhile, upon further study of the opinion, I have an added concern that may or may not be shared by other Brethren: when you say that the presence of the defendant in the courtroom may be viewed as evidence for purposes of "taint" analysis in Part IIC, are you implying that Frisbie v. Collins, 342 U.S. 519 (1952) is not applicable if there is no probable cause to arrest the defendant? I had understood that case to stand for the proposition that regardless of how the defendant came to be in the courtroom, the question was whether the trial accorded the defendant was fair. If "taint" analysis might be usable to show that the presence of the defendant in the courtroom is itself an "exploitation" of an unlawful seizure, what does that do to Frisbie?

Sincerely,

WEB

Mr. Justice Brennan

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 18 DEC 1979

Recirculated: _____

No. 78-777 - United States v. Crews

MR. JUSTICE REHNQUIST, concurring in the result.

I concur in the result reached by the Court and in all of those portions of Mr. JUSTICE BRENNAN's opinions for the Court except those which treat the mere presence of the defendant in the courtroom as "evidence" for purposes of "taint" analysis. I believe the latter question was resolved adversely to the portions of the opinion in which I do not concur by Frisbie v. Collins, 342 U.S. 519 (1952), and Ker v. Illinois, 119 U.S. 436. As stated in Frisbie, supra, at 522:

> "This Court has never departed from the rule announced in Ker v. Illinois, 119 U.S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'".

The arrest of a suspect without probable cause would surely be a "forcible abduction". But as I read Mr. JUSTICE BRENNAN's opinion it would nonetheless be subject to "taint" analysis in considering the validity of the in-court identification testimony of a witness who identified the accused in court, I cannot join those portions of the opinion.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 10 DEC 197

Re: 78-777 United States v. Crews

MR. JUSTICE REHNQUIST, concurring in the result.

I concur in the result reached by the Court and in all of those portions of Mr. JUSTICE BRENNAN's opinions for the Court except those which treat the mere presence of the defendant in the courtroom as "evidence" for purposes of "taint" analysis. I believe the latter question was resolved adversely to the portions of the opinion in which I do not concur by Frisbie v. Collins, 342 U.S. 519 (1952), and Ker v. Illinois, 119 U.S. 436. As stated in Frisbie, supra, at 522:

> "This Court has never departed from the rule announced in Ker v. Illinois, 119 U.S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'".

The arrest of a suspect without probable cause would surely be a "forcible abduction". But as I read Mr. JUSTICE BRENNAN's opinion it would nonetheless be subject to "taint" analysis in considering the validity of the in-court identification testimony of a witness, I cannot join these portions of the opinion. In my view Frisbie,

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STYLISTIC CHANGES

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

1st DRAFT

Circulated: 20 DEC 1979

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78–777

United States, Petitioner, *v.* Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[January —, 1980]

MR. JUSTICE REHNQUIST, concurring in the result.

I concur in the result reached by the Court and in all of those portions of MR. JUSTICE BRENNAN's opinions for the Court except those that treat the mere presence of the defendant in the courtroom as "evidence" for purposes of "taint" analysis. I believe the latter question was resolved adversely to the portions of the opinion in which I do not concur by *Frisbie* v. *Collins*, 342 U. S. 519 (1952), and *Ker* v. *Illinois*, 119 U. S. 436 (1886). As stated in *Frisbie*, *supra*, at 522:

> "This Court has never departed from the rule announced in *Ker* v. *Illinois*, 119 U. S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' "

The arrest of a suspect without probable cause would surely be a "forcible abduction." But as I read MR. JUSTICE BRENNAN's opinion it would nonetheless be subject to "taint" analysis in considering the validity of the in-court identification testimony of a witness. In my view *Frisbie*, *supra*, and *Ker*, *supra*, have always been thought to stand for the principle that once the court obtains jurisdiction over the suspect he may not "escape justice because he was brought to trial against his will" so long as the trial accorded him is fair. 342 U. S., at 522.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 2, 1980

Re: 78-777 United States v. Crews

Dear Byron:

Please join me in your opinion in this case concurring in the result.

Sincerely,

Mr. Justice White

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 20, 1980

Re: No. 78-777 United States v. Crews

Dear Bill:

Because there have been so many exchanges back and forth in this case, I have tried to "review the bidding" and see if it were possible to simplify at least my contribution to the decision. It seems to me that my concurrence in the result circulated December 20 is virtually indistinguishable from Byron's, circulated February 4, which the Chief Justice and I joined. It is my understanding that this is not entirely consistent with Part C and Part D of your fifth draft circulated on February 20. As I understand it, Lewis and Harry are prepared to join Part II C but not Part II D. John's separate concurrence circulated January 4 speaks for itself (since it is so short).

In the interest of cutting down the score-sheet approach that a practicing lawyer will have to take to this case, if my understanding is correct, I now withdraw my previous concurrence in the result circulated December 20 and adhere to my joinder in Byron's concurrence in the result circulated February 4.

Sincerely,

Mr. Justice Brennan

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 27, 1980

Re: No. 78-777 United States v. Crews

Dear Byron:

Please join me in your circulation of February 26th.

Sincerely,

Mr. Justice White

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To: The Chief Justice
Mr. Justice [illegible]
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JAN 3 '80

Recirculated: _____

78-777 - United States v. Crews

MR. JUSTICE STEVENS, concurring in part.

Except for the first two paragraphs of Part II and all of Part II-C other than its first paragraph, I join the Court's opinion. I do not join either side of the debate on the question whether some sanction would be appropriate in some other case involving different facts.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JAN 4 '80

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-777

United States, Petitioner, v. Keith Crews.	On Writ of Certiorari to the District of Columbia Court of Appeals.

[January —, 1980]

MR. JUSTICE STEVENS, concurring in part.

Except for the first two paragraphs of Part II and all of Part II–C other than its first paragraph, I join the Court's opinion. I do not join either side of the debate on the question whether some sanction would be appropriate in some other case involving different facts.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 9, 1980

Re: 78-777 - United States v. Crews

Dear Bill:

My problem with your rationale is this: In Davis the fingerprints sought to be introduced in evidence were excluded because they were the fruit of unlawful police conduct. In this case the prosecutor does not seek to introduce any "faces" into evidence. The presence of defendant's face at trial is merely the inevitable consequence of his being on trial in the first place, which is lawful by virtue of Ker and Frisbie. The evidence which he offers is the testimony of the victim and, as you have so cogently demonstrated, that testimony is totally untainted.

Respectfully,

John

Mr. Justice Brennan

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 21, 1980

Re: 78-777 - United States v. Crews

Dear Bill:

Like Bill Rehnquist, I have again tried to "review the bidding" in this case and have two thoughts that may be worth consideration.

First, Byron's separate writing is predicated on the assumption that the Court would have held the in-court identification inadmissible if there had been no basis for suspecting Crews prior to his arrest. In fact, however, as I understand the bidding, since no one has joined Part II-D of your latest circulation, he really is taking issue only with you rather than with the Court. It follows, I believe, that he will have to recast his opinion.

Secondly, although I disagree with your view that the defendant's face was "evidence" as set forth in Part D, I wonder if it would be acceptable to recast Part D as a description of an argument that the respondent is making, and then to hold that even assuming arguendo that his face is a species of evidence, nevertheless, he would not prevail in this case.

What I have in mind is a revision of the first paragraph on page 11 and the beginning of the second paragraph to read something like this:

> "Respondent argues, however, that his presence in the courtroom is itself a species of 'evidence.' When the victim singles out respondent and declares, 'That's the man who robbed me,' his physiognomy

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becomes something of evidentiary value, much like a photograph showing respondent at the scene of the crime.21/ And, as with the introduction of such a photograph, he argues that the crucial inquiry for Fourth Amendment purposes is whether that evidence has become available only as a result of official misconduct.

"But we need not decide whether respondent's person should be considered evidence, and therefore a possible "fruit" of police misconduct. For in this case the record plainly discloses that prior to his illegal arrest, the police both knew respondent's identity and had some basis to suspect his involvement in the very crimes with which he was charged. . . ."

If a change of this character were made at the beginning of Part D (and possibly some conforming changes later on), I would see no reason why the entire Court could not join the opinion. At least, I see no reason why I could not do so even though I believe I would come down on Byron's side of the issue if it had to be confronted.

Respectfully,

Mr. Justice Brennan

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 22, 1980

Re: 78-777 - United States v. Crews

Dear Bill:

Please join me.

Respectfully,

Mr. Justice Brennan

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